United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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74-1378

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT GUGLIARO,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF IN BEHALF OF APPELLANT VINCENT GUGLIARO

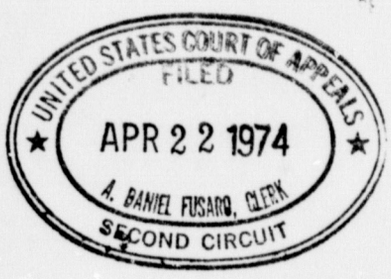

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TABLE OF CITATIONS
(Continued)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

VINCENT GUGLIARO,

Appellant.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

The appellant was indicted in the United States District Court for the Southern District of New York under Indictment No. 73 CR 513. The indictment charged seven counts of perjury based on the appellant's testimony at a stock fraud trial where he was a defendant, which trial will be referred to, for ease of reference, as the "Lasker" trial. He was acquitted of six counts and convicted solely of count 4. He was sentenced to two years' imprisonment of which he was to be confined for three months and placed on probation for two years and fined $3,000. He was continued on bail pending appeal. He filed a timely Notice of Appeal.

THE FACTS

The appellant had originally been indicted with a number of other persons in a multi-count stock fraud indictment. The stock involved was known as Imperial. The indictment came on to be tried before the Honorable Morris Lasker and a jury.

In December of 1971, the appellant testified in his own behalf in that trial before Judge Lasker. He was acquitted of all of the substantive counts and the jury could not reach a verdict as to the conspiracy count and a mistrial was accordingly declared as to the conspiracy count. He was thereafter retried on a modified indictment which charged him only with conspiracy before the Honorable Lawrence Pierce and a jury in May of 1973. He did not testify in the Pierce trial and he was acquitted.

Thereafter, in May of 1973, he was indicted on the instant indictment for the aforementioned seven counts of perjury at the Lasker trial. He was acquitted on six of the counts and was convicted on count 4. The trial was commenced before the Honorable Inzer B. Wyatt and a jury. He did not testify at that trial in his own behalf.

Prior to trial, a motion was made to dismiss the indictment on the grounds that it was barred by double jeopardy and collateral estoppel. A post trial motion was made for a new trial. Both motions were denied.

The government's case consisted of the following witnesses:

Bernard Weiss: who was a co-defendant, co-conspirator in the Lasker trial and who testified to alleged discussions with the appellant concerning Imperial in various places, including a restaurant known as the Potpourri.

Ronald Alpert: who was a co-defendant, co-conspirator in the Lasker trial and who testified as a prosecution witness against the appellant at the Pierce trial. He testified

in the instant trial and in the Pierce trial to discussions with the appellant concerning the Imperial stock in the presence of the witness Weiss at various places, including the Potpourri restaurant.

Michael Hellerman: who was a co-conspirator and co-defendant in the Lasker trial but did not participate in that trial since he pled guilty prior to trial. He testified to a number of conversations with the appellant concerning Imperial stock mainly at Gatsby's restaurant and in his office. He had not testified at the Pierce trial.

David Litvack: testified that the appellant resembled a person who had been at his bungalow colony and stayed with persons by the name of Bonadonna and Layne.

James E. Cullen: an F.B.I. agent who had at one time stopped the appellant and took a slip of paper from his person which was introduced into evidence.

Stanley Layne: rented a suite of offices which were occupied by a co-conspirator in the Imperial stock fraud, one Taylor. He testified to telephone calls being made from his office by Taylor and other alleged co-conspirators and he identified a telephone bill.

Franklin Heeter: was an employee of Bell Telephone Company and testified to a telephone number assigned to a Union in New Jersey based on telephone company records.

Mrs. Lucille Cicalo: who was a waitress at the restaurant Chez Joey. She testified that in either January or February of 1970, the restaurant was changed to Potpourri and it was

closed in May or June of 1970. That Bernard Weiss and Ronald Alpert were owners of the restaurant and that she saw the appellant at the restaurant.

Mrs. Frances Sanoff: was a hat check girl at the Chez Joey and she testified that the name was changed to the Potpourri and that it was owned by Bernie Weiss, Ronnie Alpert and one Steve Toback and that she saw the appellant there.

The appellant offered no witnesses but put into evidence documents from the State liquor authority which showed a sign indicating the restaurant to be named Chez Joey and indicating that a name change was not applied for until January 14, 1970.

POINT ONE

THE INDICTMENT SHOULD BE DISMISSED ON THE GROUNDS OF COLLATERAL ESTOPPEL AND DUE PROCESS.

The appellant was indicted together with a number of other persons in a multi-count stock fraud indictment. The case was tried before Judge Lasker and a jury in December of 1971. (This trial will be referred to for ease of reference as the "Lasker" trial). The appellant testified in his own behalf at the Lasker trial. It is this testimony for which the appellant was indicted for perjury. At the Lasker trial, the appellant was acquitted of all of the substantive counts and the jury could not agree upon the conspiracy count.

He was thereafter retried before Judge Pierce and a jury on the conspiracy count in May of 1972. (This trial will be referred to, for ease of reference, as the "Pierce" trial). At that trial, the appellant did not testify in his own behalf and he was acquitted of the conspiracy charge.

Thereafter, he was indicted in May of 1973 on the indictment which is the subject matter of this appeal. That indictment charged seven counts of perjury based on the appellant's testimony at the Lasker trial.

Prior to trial, a motion was made to dismiss the indictment on the dual grounds of collateral estoppel and due process. A copy of the moving papers are made a part of the Appendix. That motion was, of course, directed to all counts of the indictment. In this point, we will, of course, direct it to the remaining one--Count Four. The questions

and answers which were the gravamen of that count reads as follows:

"Q. Did you ever see him (Weiss) in the Potpourri restaurant?

A. No, sir.

Q. Were you ever in that restaurant, Mr. Gugliaro?

A. No."

At the Pierce trial, the prosecution called as one of their witnesses one Ronald Alpert, he was a co-defendant with the appellant at the Lasker trial and did not testify in his own behalf at that trial. In the Pierce trial, he testified repeatedly on direct examination concerning Gugliaro's alleged presence in the Potpourri restaurant, and his meeting with Weiss in that restaurant. The pages which confirmed that testimony were attached and set forth in schedule form in the pre-trial motion.

At the trial at bar, Alpert testified again to meetings between Weiss and the appellant at the Potpourri and this was supplemented by testimony of Weiss to the same effect. A former judgment barred relitigation of an issue of ultimate fact which has been determined by that final judgment applied in criminal law. U.S. v. Oppenheimer, 242 U.S. 85. In our circuit the rule was stated in U.S. v. Kramer, 289 F2d 909 (1961 : 2nd Cir.). The Kramer case dealt with an acquittal in another Federal Court of the charge of post-office burglary. The defendant was then tried in the Eastern District of New York for a conspiracy to commit the post-office burglaries, the Court of Appeals reversed the conviction. In

Kramer (supra), the Court disposed of the government's argument of lack of mutuality. They also disposed of the contention that the prior judgment may have been on the true basis that the government had not met its higher burden of proof on the whole case although not necessarily as to every link in the chain.

In the case of Sealfon v. U.S., 332 U.S. 575, the Court made it clear that the rule of collateral estoppel should not be applied with a hypertechnical or archaic or restricted point of view. The purpose of this was to encourage the examination of the record of the prior trial, including the pleadings, evidence, charge and other relevant matters, to determine whether in fact the prior jury grounded its verdict upon issues other than those which the defendant seeks to foreclose.

It should be noted in passing that at bar examination of the trial testimony and the indictment clearly established that the issues litigated by the perjury indictment have of necessity already been decided.

The Sealfon case (supra) went on to point out that the suggested inquiry must be done practically otherwise the rule would become meaningless.

Of course, where it is clear that the issues were not previously litigated, the first acquittal is held not to be at bar. Thus in U.S. v. Lopez, 420 F2d 313 (1969 : 2nd Cir.), the prior acquittal for conspiracy was based on the Court's finding that more than one conspiracy was proved and it did not go to the merits, therefore it was held not to bar a subsequent substantive conviction.

The Supreme Court has had fairly recent occasion to restate the principle of Sealfon (supra) in connection with two State cases. The first of such cases was Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L Ed 2d 469. At the sake of anticipation, the Ashe case (supra) may be wholly appropriate to the prosecution strategy at bar. Ashe dealt with multiple prosecutions of a defendant for the robbery of a card game. In the first trial, he was charged with robbing only one of the participants in the game. He was acquitted and then tried for robbing a second participant. The identification in the second trial was reinforced by refreshed witnesses. The second trial resulted in a conviction. The court on page 447 quoted from the respondents brief and stated its own conclusion which is applicable at bar.

> "No doubt the prosecutor felt the state had a probable case on the first charge, and when he lost, he did what every good attorney would do- he refined his presentation in light of the turn of events at the first trial. But this is precisely what the constitutional guarantee forbids."

At bar, we submit the conspiracy in the Pierce trial was sought to be proven by Taylor and Alpert testifying. As previously stated, Alpert testified at length to the appellant's presence at the Potpourri at the same time as Weiss. The prosecution did not achieve its goal and the appellant was found not guilty, now they seek to refine that very same prosecution under the guise of a perjury indictment, with additional witnesses, in the words of Ashe (supra), "this is precisely what the constitutional guarantee forbids."

The second case recently decided on the issue is Harris v. Washington, 404 U.S. 55 (1971). In Harris the petitioner was tried and acquitted of sending a bomb through the mail which exploded and killed a person. He was then reindicted for murder and assault because one person was killed by the explosion and another person was injured. The Supreme Court held the prosecution estopped. The highest State Court had permitted the prosecution on the theory that a letter which was excluded at the first trial from evidence was clearly admissable at the second trial, and therefore the issue of identity had not been fully litigated. The Supreme Court rejected that argument stating on page 56

> "We said that collateral estoppel means simply an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443, 25 L Ed 2d at 475. The State concede that the ultimate issue of identity was decided by the jury in the first trial. That being so, the constitutional guarantee applies, irrespective of whether the jury considered all relevant evidence, and
>
> (404 U.S. 57)
>
> irrespective of the good faith of the State in bringing successive prosecutions."

At bar, we submit the jury in the Pierce trial considered all of the relevant evidence which bears on the fourth count of this indictment.

The position of the prosecution in the motion was that the issues in the two trials were different, and the Pierce acquittal did not necessarily turn and involve an implicit finding in it that the appellant was not at the Potpourri or met Weiss there. The prosecution maintained in effect that there could be an acquittal for a multitude of reasons, other than the jury disbelieving Alpert or his testimony concerning the appellant, Potpourri and Weiss.

This causes us then to ask, can the government have it both ways? If these ultimate issues of fact viz the appellant being in the Potpourri and also seeing Weiss there were not necessarily determinative of or determined in the Pierce acquittal, then are they questions which are of sufficient materiality in the Lasker trial to sustain indictment and conviction for perjury?

We respectfully submit the answer should be in the negative.

The materiality of a question or statement more readily appears when same is part of a grand jury proceeding then when it is offered in a litigation. U.S. v. Stone, 429 F2d 140 (2nd Cir : 1970).

Before the grand jury, the test is really whether the answer impedes, influences or dissuades the grand jury. Carroll v. U.S., 16 F2d 951 (2nd Cir. : 1927); U.S. v. Freedman, 445 F2d 122 (2nd Cir.:1971).

Of course not every knowingly false statement under oath is perjurious. The fact that the question or its answer may go to the issue of credibility is not of itself disposative on the issue of materiality. All it shows is that the question and answer may be material. (Emphasis provided). U.S. v. Freedman (supra).

In other words, it could be considered some evidence on the issue of materiality. In a recent case, the Court of Appeals indicated by negative implication that perjury in a trial to be material must go to ultimate issue of guilt or innocence. In U.S. v. Mancuso, 485 F2d 275 (2d Cir : 1973), the Court considered prejury before a Grand Jury and stated on page 280:

> "False testimony before a Grand Jury need not bear upon the ultimate question of guilt or innocence of specific Federal crimes in order to possess the requisite materiality."

This we submit supports the negative implication previously advanced concerning perjury at a trial.

Examination of the questions and answers at issue belie any inference that they go to the question of guilt or innocence. We submit the prosecution by their position on the issue of collateral estoppel recognized that their questions did not go to the issue of guilt or innocence. They argued that the verdict at the Pierce trial did not turn in the jury's disbelief of Alpert's testimony concerning the Potpourri, the appellant's presence therein and his seeing Weiss there.

On the issue of credibility, it is submitted that all of the testimony on the subject has to be examined, including that of the waitress and hat check girl which is amplified at a later point in this brief.

The questions were general and not specific; they were not precise; and, were not pursued. The testimony of the government's witnesses at this trial indicate the existence of the restaurant under another name for an extended period of time. Thus, if credibility were indeed the issue, questions would have been pursued to pin down the answer by giving the location of the restaurant, its existence under another name, etc. We submit that these two rather imprecise questions standing alone on the subject matter of the Potpourri do not render a sufficient status on even the issue of credibility so that they may be said to bear on materiality. (Emphasis added).

We submit that the procedure followed by the government in bringing this perjury indictment violates this appellant's rights to due process and equal treatment. This appellant testified in December 1971. He was retried in the Pierce trial in May of 1972 on a redrawn indictment. There was no mention of the alleged perjury in the Pierce indictment. After the Pierce acquittal, this appellant is now faced with a third trial on basically the same series of facts and evidence.

In this same vein, it is suggested that the appellant should have been allowed to indicate to the jury his prior acquittals in the Lasker and Pierce trials. Under the guise of background material and particularly through the witnesses, Weiss, Alpert and Hellerman, all of alleged Imperial stock

fraud evidence was put before this jury. (A- 37 through A- 42). Counsel made repeated objection and requested either a mistrial or some instruction to the jury that the appellant had been acquitted at the Lasker and Pierce trials. (A- 7 through A- 11) (A- 45 through A- 48) and (A- 47 through A-48b).

The court did advise the jury on several occasions that the Imperial stock fraud case was not being tried. Nevertheless, the volume of testimony on the Imperial stock subject in effect resulted in a retrial of the issue. At one point, the Court without any objection from counsel took cognizance of the inordinate volume of Imperial testimony. (A- 44). We found no cases in our Court on this issue.

We submit at bar, it was relevant because of the airing of all of the unnecessary details of the Imperial matter on which this appellant had been twice acquitted. We submit further that the prosecution paraded the Imperial trial and all of its details before this jury and thereby opened the door so to speak to the acquittal.

This problem of fairness also greatly troubled the Trial Court. There was a point where counsel moved for a mistrial or, in the alternative, for an instruction to the jury to the effect of two prior acquittals for the appellant. This was a consequence of the witness Hellerman's extensive testimony about the Imperial manipulation. The Court expressed its concern over the problem. (A- 53 through A- 57).

Ultimately, of course, it did not grant the mistrial or instruct the jury as to prior acquittals.

This problem of balancing the equities, between allowing sufficient background material and yet preventing a trial or, in this case, a retrial of either extraneous or previously decided issues, has been resolved in the State Court. People v. Stanard, 32 N.Y. 2d, 143 (1973).

The New York Court of Appeals opted in favor of granting a new trial, where extraneous background material was spread before the jury.

At bar, the extent and breadth of the Imperial material should have been balanced by the instruction to the jury that the appellant had been acquitted with no further comment allowed on this by counsel. Particularly is this the case when we examine the prosecutor's summation and see the detail with which the entire alleged Imperial deal was recounded to this jury.

POINT TWO

THE TRIAL COURT ERRED IN FAILING TO CHARGE AS REQUESTED IN ACCORDANCE WITH BRONSTON v. UNITED STATES.

The appellant requested three particular charges which were taken from Bronston v. United States, 93 S.Ct. 595 (1973). They were as follows:

"If you find that the question asked is not sufficiently specific to allow the defendant to understand and answer it, you must acquit the defendant."

"Ladies and gentlemen, we are not dealing with casual conversation and the statute I have read to you does not make it a criminal act for a witness to knowingly state any material matter which implies any material matter which he does not believe to be true.

Thus, if you find that the answers contain material which it is implied is untrue, or which by implication he knew was untrue, that is insufficient to convict and you must acquit."

"There must be precise questions before you can find that there was perjury. Even if you find that the defendant's answers were calculated to evade a question, you cannot convict of perjury."

The questions which were the basis for the conviction at bar revolved about the Potpourri. Neither of the two questions were precise--the first portion required a reference back to a previous question to determine who the subject was. The second question required a reference back to the previous one to determine that it was the Potpourri that was being

referred to. Neither of the two questions were followed up with any detailed or precise inquiry on the same subject. The appellant offered no witnesses in his defense case. He did offer documents through prosecution witnesses. The documents showed that the restaurant involved was known as the Chez Joey, for a period of time. The prosecution witnesses, Mrs. Cicalo and Mrs. Sanoff established that it was known as the Chez Joey for an extended period of time. In the case of Mrs. Cicalo, until either the end of January or February of 1970. (A- 59). In the case of Mrs. Sanoff, until late February, or March, or April 1970. (A-58).

The issue at bar is similar to the issue in Bronston (supra). Based upon all of the evidence adduced by the prosecution, the appellant's answer concerning the Potpourri restaurant were in the language of Bronston (supra) "literally true". As the evidence revealed, he could and did know the restaurant as the Chez Joey. Both questions of course were contingent on the restaurant being known as the Potpourri. The best that can be said of the prosecution's evidence was that the answer implied untruthful material since he could have known that the restaurant he knew as the Chez Joey was later changed to Potpourri. However, as was said in Bronston (supra), the Statute does not make it a criminal act for a witness to imply any matter which he does not believe to be true. The intention to mislead the examiner, if that be the case, is not the basis for a perjury conviction.

The appellant's requests were, as previously indicated, taken in tact from the decision in Bronston (supra). It is

submitted that they had particular application to the questions contained in the fourth count of the indictment.

The appellant's position may best be summed up by the following language at page 601 of Bronston (supra):

> "...the perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner - so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry."

POINT THREE

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A NEW TRIAL.

Bernard Weiss, who was the subject of the first question, which was part of the fourth count, testified for the prosecution. He testified to numerous meetings with the appellant at the Potpourri. He also testified to a conversation with the appellant during the Lasker trial. A side bar called for by defense counsel resulted in an assurance from the prosecution that the question of the witness' cooperation would be developed and it was not relevant to this question. (A- 14 and A-15). In further testimony, Mr. Weiss gave the clear impression that his cooperation with the government started in September of 1972. (A- 21). He stated at a later point, October 1972, (A- 22 and A-23), as the date of his first meeting with the government about cooperating. He then indicated he could not give a correct answer as to when he started to cooperate--that is, whether it was October 1972 or a month later or so (A- 24). He continued on the same page that it was approximately October, November or December of 1972 that he began to cooperate.

While the jury was deliberating, Mr. Weiss was a witness at a trial in an adjoining Courtroom. In that trial, the prosecutor offered defense counsel an F.B.I. memo, which indicated that the witness, Weiss, began cooperating with government agencies in February of 1971. This was a date prior to the Lasker trial, and, of course, prior to the

previously referred to conversation with the appellant concerning the restaurant being known as the Chez Joey. The memo which was furnished in the other trial was made part of the record on the motion for a new trial and is available to this Court. The existence of this memo and its production in the adjoining trial was made known to Judge Wyatt while the jury was deliberating. (A-49 through A-52). After the verdict and prior to sentence, a motion was made for a new trial based on the fact that neither the memo or its contents of February 1971 cooperation were made available to the appellant and on the further ground that nothing was done by the prosecution to correct the record as to the date of initial cooperation.

The adjoining trial was U.S. v. Gugliemini. In that case, the witness, Weiss, corrected his testimony to indicate that he commenced his cooperation with the F.B.I. in February of 1971. The report memo was submitted to the prosecutor in the Gugliemini case on September 23, 1973. The prosecutor in that case was, of course, in the same office as the one at bar. Therefore, it must be presumed the prosecution knew, should have known or had available on inquiry the same information. The prosecutor indicated by implication (A-51) that a sentencing memo used by Judge Lasker to sentence the witness, Weiss, contained a notation of Weiss' cooperation since February 1971. Of course, this memo was displayed to the Court in camera and never revealed to the appellant or counsel.

It appears beyond controversy that the report memo dated September 1973 was deliverable to the appellant as either 3500 material or Brady material.

Rule 3500 in its relevant portion reads as follows:

"After a witness called by the United States has testified on direct examination, the Court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

Brady v. Maryland, 83 S.Ct. 1194 requires the delivery of material favorable to the defense.

It is also deliverable under the precepts of United States v. Roviaro, 77 S.Ct. 623. In that case, the Court stated at page 628:

"Where the disclosure of an informant's identity or the contents of his communication (emphasis supplied) is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause, the privilege (secrecy) must give way."

(the word "secrecy" is supplied for clarity)

Certainly, it is beyond argument that this document and its contents would have been helpful to the defense. As will be later developed, it presented unlimited opportunities on cross-examination and beyond this, would bolster a contention of the defense that an earlier version of events given by the witness under oath were the truth and not what he testified to at the trial.

In addition to the failure to comply with Rule 3500 and the requirements of Brady v. Maryland (supra), there were other vices in this procedure. As previously indicated, the prosecution had to know of the earlier date of cooperation; thus, they were obligated to correct the record, so to speak. In United States v. Lusterino, 450 F2d 572 (2nd Cir : 1971), the Court reversed a conviction for counterfeiting. The prosecution allowed a witness who was cooperating with the government prior to his arrest and that of the defendant, to testify as if he were a bona-fide co-defendant. He also was allowed to testify to post-arrest conversations with the defendant including an alleged request by the defendant that the witness take the "weight" and he (the defendant) would support the witness' family. The Court held in reversing that the prosecution had the true facts, and that although this type of subterfuge might have a place in investigating crime, it had no place in trials.

The Court stated on page 575:

"The prosecutor could not honestly permit Grillo's profession of guilt before the jury to go unchallenged and a verdict to rest upon it."

At bar, the prosecution could not permit Weiss' testimony that his cooperation began in October of 1972 to go unchallenged.

The Lusterino case (supra) also dealt with the contention that no harm was done by allowing the informant to testify as he did. The prosecution contended it was harmless since Grillo's status as an informant was explored thoroughly on cross-examination. The Court rejected this argument, stating that even if the jury was sufficiently cynical to disbelieve the witness, nevertheless, the jury may (emphasis supplied) have given some weight to the witness' statement of guilt. Thus, the test was what the jury may have done. The Court went on to state on page 575:

> "When the prosecution participates in allowing a false picture to be painted, it bears a heavy burden of showing that it could not have affected the verdict. It has not shown that here. A verdict based on such a deception must be set aside."

It is submitted that the prosecution cannot meet the burden at bar, and beyond that, examination of the record at bar clearly indicates that the verdict was affected.

In United States v. Mele, 462 F2d 918 (2nd Cir : 1972), a conviction for possession of narcotics was reversed. Madonia was arrested and gave information before the defendant was arrested. He did not testify at the trial about his informer role since that early date. He did testify about his post-arrest contacts

with the defendant and his contacts with the defendant continued while both Madonia and Mele were defendants together at the trial. The government submitted 3500 material which did not reveal Madonia's role as an informant on the early date and which did not reveal that Madonia's car had been impounded at an earlier date. A post-trial ordered hearing revealed that the chief prosecutor knew of Madonia's informant status, and even if he did not know that Madonia's car was impounded, the narcotic agents knew this. Thus, the prosecution was held responsible for the knowledge of one other than the actual prosecutor to wit: the chief prosecutor and the narcotic agents. At bar, the same rule must be applied for the reasons previously given; the knowledge of Assistant United States Attorney Higgens and also the prosecutor at bar was assisted by the F.B.I. in the prosecution of this case.

The Court stated that there must be a reversal even if the prosecution does not solicit the false testimony as long as they do not correct it when it appears.

The Court emphasized that the very least they required of the prosecution was that it completely reveal the true facts to the Court so that a balance of interest could be struck by the Court; not by one involved in the competitive aspects of prosecution.

In ordering a new trial, Associate Justice Clark, sitting by designation in the Circuit, wrote for a panel consisting of himself, Judge Friendly and Judge Kaufman, at page 924:

"Rule 33 does not require a new trial unless the newly discovered evidence will probably result in a different verdict or sentence for the defendant. Due process, however, requires that a different rule be applied when prosecutorial suppression has caused the evidence not to be presented at trial. At least where the suppression is deliberate the defendant need only show that the evidence is material and could in any reasonable likelihood have led to a different result."

The date of cooperation, and the withheld report were in the words of Mele (supra) material at bar, and clearly affected the defense. For example, the alleged conversation forecast the defense and case suspicion upon it in advance of its submission. However, if the material had been delivered to counsel, it could have been established to the jury that the witness was already an informant at the time of the alleged conversation, yet he made no notes of it, no immediate report of it to the prosecutor, or the F.B.I. The report showed that he cooperated with the F.B.I. re: Imperial in June of 1971 to the extent of relaying information concerning another defendant's action to allegedly manufacture a defense. Despite this, no statement concerning the alleged conversations with the appellant until after October 1972 was made, thus leaving it open to the suggestion of recent fabrication. Beyond this, it could have raised a question concerning the prosecution's tactics having an informant Weiss sitting at the defense table in "Imperial I" with the other

defendants. It is also to be remembered that Weiss testified at the "Imperial I" trial in direct contradiction to his testimony at bar. Imagine if the jury was made aware that at the time he gave that testimony, he was a government informant and cooperating with them, they certainly could and probably would, infer that testimony was the truth. Beyond this, the jury could rightfully question the government's good faith in allowing their informant to testify at "Imperial I" without revealing his status and allegedly standing by while they claim he perjured himself at that trial. The possible uses on cross-examination are only limited by the imagination of the affiant. In short, it is submitted that this report was material and could in every likelihood have led to a different result.

The Mele case (supra) relies on two Supreme Court cases, one of which is Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1959). In this case, a co-defendant witness denied he received any promise of consideration in exchange for his testimony, the prosecution did nothing to correct this. The Court in reversing, stated on page 1177:

> "The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given wit-

ness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S. 2d 885, 887, 136 N.E.2d 853, 854-855.

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth * * *
> That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Second, we do not believe that the fact that the jury was apprised of other grounds for believing that the witness Hamer may have had an interest in testifying against petitioner turned what was otherwise a tainted trial into a fair one."

The second case relied upon was Giglio v. United States, 92 S.Ct. 763. In this case, a conviction was reversed where the testifying co-conspirator denied any promise was made to him; later on, an assistant indicated he had made a promise of no prosecution. The Court stated at page 766:

"As long ago as Mooney v. Holohan (citation) this Court made clear that deliberate deception of a court and jurours by the presentation of known false evidence is incompatible with 'rudimentary demands of justice...

"When the "reliability" of a given witness may well be determinative of guilt or innocence non-disclosure of evidence affecting credibility falls within this general rule."

The Court went on to cite with approval the standard previously quoted in this affidavit, and taken from Napue v. Illinois (supra) to the effect that if there is any "reasonable likelihood" the judgment of the jury could have been affected, a new trial is required. In this same vein, Brady v. Maryland, 83 S.Ct. 1194 held that suppression of material evidence requires a new trial irrespective of the good or bad faith of the prosecution. The withholding of evidence "favorable" to the accused was itself sufficient to amount to denial of due process.

The standards applicable to a motion for a new trial, as stated in the various Supreme Court cases such as Napue, Brady and Giglio (supra), have been relied upon in various cases emanating from our Circuit.

Thus, in Kyle v. United States, 297 F2d 507 (1961), in an appeal after a sentence was served, a hearing was ordered to determine whether missing letters were suppressed. The Court cited with approval the previously quoted language from Napue (supra), to wit: a lie is a lie no matter what its subject and if it is relevant in any way, the case must be reversed and not only must the administration of justice be above reproach, but

it must be beyond the suspicion of reproach.

In United States v. Koegh, 391 F2d 138 (1968), a hearing was ordered concerning the withholding of an F.B.I. report and financial evaluation of a government witness. The Court also relied upon previously quoted language of Napue (supra) to the effect that intentional suppression and also "should have known" suppression mandates a new trial. They also restated the Brady (supra) position that good faith or bad faith of the prosecutor is of no moment, but if material is suppressed which is favorable to the accused, either on the issue of guilt or punishment, a new trial is required. The Court indicated a new trial was required even if suppression was not deliberate and no request made, but if hindsight showed the defense could have used the evidence in other than an insignificant way. This test, we submit, has been more than met at bar.

In United States v. Kahn, 472 F2d 272 (1973), even though no relief was afforded on the facts of that case, the Court restated the principles of Giglio and Brady (supra). The Court stated that if there is deliberate suppression, relief is required if what was suppressed was material or favorable to the defense. Even if suppression is unintentional, if the material suppressed has apparent high value, relief is required. The test in both of the foregoing cases is the effect of its suppression on preparation for trial, not its effect on the jury's verdict. Even where the suppression is inadvertent and does not involve obviously high value evidence, the movant need not show probability of a different verdict; merely that there is a significant chance that this added item in the hands of skilled counsel, could have induced a reasonable doubt without intending to evaluate your affiant's ability. It is submitted that the material involved

could have evidenced a reasonable doubt at bar.

A most recent case on the subject of suppression is United States v. Pacelli which appears in the slip opinion of January 11, 1974, page 1347. The issue was the failure to produce a letter written by a government witness to the prosecutor. The Circuit Court reversed the conviction and remanded the matter for a new trial. The Court did this even after accepting the government's assertion that the non-disclosures were inadvertent; held that a new trial had to be granted. One of the reasons they gave is that the letter involved contained a blatant lie. At bar, the documents suppressed would tend to indicate that the witness' testimony as to the first date of his cooperation was a blatant lie. The decision in Pacelli (supra) might be best summed up in the following statement which is applicable at bar:

> "Denial of the opportunity to use such forceful impeaching material bearing on the credibility of the government's key witness mandates a new trial."

It is submitted that on every applicable standard, relief is mandated at bar:

a. There was suppression of material known to the United States Attorney's office;

b. Whether intentional or not, it is obviously material or of high value since it puts a lie to the prosecution witness on the key date of cooperation;

c. The bad or good faith is immaterial;

d. The material is highly favorable to the defense;

e. It effected the preparation and progress of the defense.

In addition to all of the foregoing, there are other infirmities to what transpired. Since Weiss was an informant prior to the alleged December 1971 conversation with Gugliaro, contrary to the side bar assurance of the prosecutor, the question of infiltration of Gugliaro's defense at the Imperial I trial, in violation of the Sixth Amendment, had legal viability.

Further, since the alleged conversation was post the Imperial I indictment, and Weiss was a government informant, Massiah v. United States, 84 S.Ct. 1199, would become operative.

(See also footnote page 574 United States v. Lusterino (supra)).

The motion for a new trial was denied without a hearing.

It is submitted that on all of the aforementioned authorities and whether we use the test established in Napue, Mele, Keogh, Brady, Massiah or Kahn, (supra), a new trial was required.

POINT FOUR

THE PROSECUTOR'S SUMMATION DEPRIVED THE APPELLANT OF A FAIR TRIAL.

The actual trial of this indictment lasted four days, exclusive of summations charge and verdict. The prosecutor's summation covered some 31 pages.

The general precept concerning a prosecutor's role on summation has been restated recently by this Court with rather great frequency. That is that the prosecutor strike hard blows but not foul blows. U.S. v. White, 486 F2d 204 (1973).

The prosecutor may not put his or her credibility or integrity or that of the office of United States Attorney at issue. It is submitted this was done at bar when the prosecutor states:

(In referring to the informant witnesses)
"...if they are caught lying, they will be indicted for perjury." (A- 61).

(In referring to the witness Alpert)
"If he perjures himself, he's in trouble. That's it." (A- 71).

"What is the government's beef against Vincent Gugliaro?" (A- 84 and A- 85).

"I also suggest to you he (Gugliaro) knew where the Potpourri was, he knew what he was testifying about in 1971." (A- 86)

When counsel objected at this point, the prosecutor went on to assure the Court and jury that neither she nor defense counsel were there. She then proceeded to vitiate this assurance when she states:

"When this sign went up, you can be sure Mr. Gugliaro saw the sign Potpourri. It is rather large." (A- 87).

This latter remark not only constituted the injection of the prosecutor's credibility and integrity in the balance, but in reality was not a comment on any evidence in the record since there was no testimony as to the size of the Potpourri sign. U.S. v. Gonzalez, 486 F2d 204 (2nd Cir : 1971).

She went on to state in referring to the witness as if it were a fact that she was attesting to, that the appellant dealt with them when she stated:

"And don't forget that these people were good enough when they dealt with Mr. Gugliaro to deal with him." (A- 69)

The practice of a prosecutor placing his or her credibility in issue or putting the integrity of the office behind a witness or any other action on their part has been universally condemned. U.S. v. Drummund, 481 F2d 62 (2nd Cir : 1973).

Where the Court has not seen fit to reverse, nevertheless, they have condemned the practice of placing prestige behind government witnesses. U.S. v. LaSorsa, 480 F2d 522 (2nd Cir : 1973).

In the same vein, the prosecutor, it is suggested, misstated the law applicable to the calling of witnesses when she stated as to witnesses, if either side did not call them, their testimony would be unfavorable to either side. (A- 63 and A- 64). She referred to witnesses such as Kelsy or Taylor, both of whom it must be conceded were peculiarly within the control of the government. The test is control, not mere availability, to be subpoenaed. Thus, as part of it takes on particular

moment when read together with the extended colloquoy defense counsel held with the Court in the subject of proposed charge particularly as to these two witnesses. The prosecutor appealed to the community sense of law and order when she states in commenting on her witnesses:

> "If you accept Mr. Newman's proposition, it means that no criminal can ever be convicted of a crime because you shouldn't listen to the witnesses that get up there and talk about it, the other people who know what the other person is doing. Who else is going to testify to it?" (A- 68).

She repeated this type of appeal when she stated:

> "I suggest to you that if the oath means anything, if the words, "Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God", means anything, I submit to you that you ought to find the defendant Vincent Gugliaro guilty of violating that oath on all counts of the indictment." (A- 90).

This type of appeal has been condemned as an ill-conceived type of appeal even if in the facts of that case it did not warrant a reversal. U.S. v. Miller, 478 F2d 1315 (2nd Cir : 1973).

The appellant's character was put in issue when the prosecutor, in referring to an alleged meeting where the appellant was alleged to be present, stated:

> "...only people who can testify to these meetings are the people who are there and the people who are there are all crooks." (Emphasis supplied). (A- 69).

Aside from putting the non-testifying appellant's character in issue, it also constituted hurling epithets at him. U.S. v. Benter, 457 F2d 1174 (2nd Cir : 1972). She commented upon the defense characterizing certain efforts as "desparate attempts" (A- 70) by the defense, but "they failed" (A- 70). U.S. v. Drummund, 481 F2d 62 (2nd Cir : 1973).

This was repeated in referring to cross-examination:

"It is a desparate attempt to find an inconsistency." (A- 73).

She misstated and ridiculed the defense when she stated:

"But you have got to get rid of that, either get rid of it by calling the restaurant Chez Joey and charge that Mr. Gugliaro made a mistake or by saying that the witnesses said certain things which they didn't say and we will get to that in a few minutes." (A- 63).

It is submitted in viewing this point that the defense summation did not call for this type of response. This was a relatively short trial, not hotly contested and most importantly the evidence was not that overwhelming. This is borne out by the fact that the jury acquitted on six of the seven counts. This has import we suggest, for the complained of acts take on greater importance where issues are in fine balance. We recognize the Court is loathe to reverse for prosecutor's conduct in a number of cases where the evidence was compelling. This was not the situation at bar. Objection was made to most, if not all, of the complained of remarks at the conclusion of the summation and some during the course of same.

C O N C L U S I O N

THE CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED, OR, IN THE ALTERNATIVE, A NEW TRIAL ORDERED.

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DATED: New York, New York
April 5th, 1974

Service of ~~three (3)~~ two (2) copies of the within Brief is hereby admitted this 22nd day of April 1974

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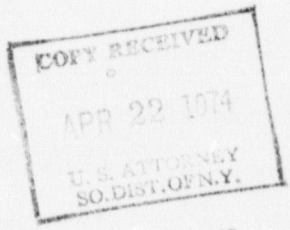
Attorney(s) for



PAUL J. CURRAN